CIVIL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

GLORIA SCOTT AND	*	
DEANIA JACKSON	*	
	*	NO. 96-8461
VERSUS	*	DIVISION "I"
	*	SECTION 14
THE AMERICAN TOBACCO	*	
COMPANY, INC., ET AL.	*	
	*	
* * * * * * *		

Transcript of proceedings before The Honorable Richard J. Ganucheau, Judge Pro Tempore, Civil District Court, Parish of Orleans, State of Louisiana, 421 Loyola Avenue, New Orleans, Louisiana 70112, commencing on June 18, 2001.

* * * * *
Thursday Afternoon Session
June 5, 2003
1:33 p.m.
* * * * *

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I N D E X

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P R O C E E D I N G S

THE BAILIFF:
All rise for the jurors, please.
(Whereupon the jury joins the proceedings at this time.)
THE LAW CLERK:
Recess is over. Court will come to order. Please be seated.
THE COURT:
Good afternoon.
THE JURY:
Good afternoon.
THE COURT:
Mr. Gay.
MR. GAY:
Good afternoon, everyone.
THE JURY:
Good afternoon.
CONTINUED DIRECT EXAMINATION

BY MR. GAY:

Q. Dr. Whidby, when we finished, we were talking about whether Philip Morris added nicotine to its cigarettes. Do you recall that topic?

A. Yes, I do.

Q. I wanted to ask you just a few more questions on that subject.
As a cigarette design person at Philip Morris, you are aware that Philip Morris uses certain ingredients in its cigarettes?

A. Yes.

Q. And we talked about some of those; correct?

A. Correct.

Q. All of those are tested for biological activity?

A. That is correct.

Q. And Philip Morris also tested what's called reference cigarettes for biological activity?

A. They did.

Q. Would you explain to the jury why Philip Morris does both those things? Please explain that.

A. Well, we evaluate reference cigarettes to determine their biological activity, if you will, based upon standard tests.
In addition to reference cigarettes that are evaluated, Philip Morris also looks at test cigarettes and control cigarettes. Control cigarettes are cigarettes that are very similar to what's in the marketplace.
The test cigarettes that are part of that group of three types of cigarettes are cigarettes

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that have had special modifications made to them.
So in doing a test, a biological test in particular, you look to the reference cigarette to make sure that it tells you that the test you're evaluating is consistent from day to day and from laboratory to laboratory. Reference cigarettes are used around the world by researchers to ensure that their test is doing what they think it's doing.
Then you look at the control cigarette versus the test cigarette to find out if what you've done has changed the biological activity of that particular cigarette, either up or down.
Q. And the goal of that testing is what?
A. The goal of that testing is to improve the

cigarette.
Q. Is the goal also to make sure that you're not doing anything to the cigarettes with the ingredients that increases the biological activity?
A. That is correct, yes.
Q. Now, as a cigarette design person at Philip Morris U.S.A., do you know whether or not Philip Morris U.S.A. has ever added ingredients to its cigarettes in order to increase the nicotine delivery to smokers?
A. They have not.
Q. At any time?
A. No, not that I -- Certainly, not that I'm aware of, no.
Q. Are you familiar, Dr. Whidby, with something called the human smoking simulator?
A. Yes, I am.
Q. How are you familiar with that?
A. I worked on it. I worked, for a portion of my time that I was at Philip Morris, I worked on the program.
Q. You worked on -- Well, what is a smoking, human smoking simulator?
A. Well, a human smoking simulator program was an effort by researchers at Philip Morris to try to determine how individual people smoked various types of cigarettes. And it was a program that was going --
MR. RUSS HERMAN:
Objection. May I approach?
THE COURT:
Yes.

(Whereupon a bench conference is held at this time as follows:)
THE COURT:
Mr. Herman?
MR. RUSS HERMAN:
He testified on qualifications that he's not an expert in compensation, the way human beings smoke or on titration. The question as to whether he worked on a machine is okay. But the answer that implies as an expert he understands and knows how human beings smoke

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is clearly outside of his expertise.
THE COURT:
You objected in the middle of his answer. He said Philip Morris was going to something. Do you know what his answer is going to be?
MR. RUSS HERMAN:
He got farther than that. I don't know whether the --
THE COURT:
Read it. It's on my machine. Come read it. Come up here.
MR. RUSS HERMAN:
The sentence right before says this is an effort to determine how human beings smoked, an area that he is not an expert in.
MR. GAY:
Judge, it's not a question does he know how people smoke. The question is about the project was an effort.
THE COURT:

Yes.
MR. GAY:
And it's a machine that describes what its purpose was.
THE COURT:
Yes.
The objection is overruled. Next question.
(Whereupon the bench conference is concluded at this time.)

EXAMINATION BY MR. GAY:

Q. I think I was asking you what was the human smoking simulator. And you were in the middle of your answer or wherever you were in your answer, you were stopped. So could you continue?
Well, let me break it down.

A. Okay.

Q. Can you describe what the machine was that was involved in this project that you participated in concerning the human smoking simulator?

A. I can.

Q. Okay. Tell the jury what this machine was first. Let's do that.

A. Okay. Well, the machine was -- it's actually a combination of things that we put together to allow the machine to record the way an individual was smoking a cigarette.
And the parts of it were -- Again, remember, this was in the early -- the mid '70s, so all the technology and electronics that are available today weren't available then.
We had a cassette recorder that would record

the puff volume, that is, how much volume a person was taking in, the duration of the puff, and the number of puffs from the cigarette.
And it got its information from a cigarette

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holder that the cigarette was put into, the person put the holder into their mouth, and it had tubes running from the holder down to the sensor and the recorder so that it could sense the puff volume and frequency, as we said before, and record that, record that over a period of a number of cigarettes.
Q. So the smoker was hooked up to these things you described?
A. Yeah. I need to continue.
Q. Okay. I'm sorry.
A. Sorry.
And then so all that information was recorded on a cassette tape. That cassette tape could then be taken to a smoking machine and then played back on that smoking machine and how the smoking machine smoked another cigarette like that individual was smoking the cigarette.
You could from that smoking machine then capture the tar and nicotine to determine how much tar and nicotine that particular individual was getting.
Sorry.
Q. Okay. And what observations did you have as a factual matter about what smokers did when they were hooked up to this machine?
A. First of all -- Well, one of the things that the smokers said, complained about, was that they were unable to smoke the cigarette using this

contraption, this apparatus, in the same way they smoked -- they normally smoked. That was one of the -- one of the concerns that they had. And the other thing is that as we, I guess, knew all along, everybody smoked differently.
Q. Now, the human smoking simulator was an experiment?
A. Yes, it was.
Q. And, in your opinion, as a cigarette design expert, was it a successful experiment?
A. No, it was not. It did not give us information that would lead to improved cigarette designs.
Q. So it wasn't news that smokers smoked cigarettes differently?
A. No, it was not.
Q. Now, isn't it a fact, Dr. Whidby, that during your tenure as the cigarette design expert, that the FTC, in fact, told the public, when it adopted the test for determining levels of tar and nicotine, that people smoked cigarettes differently?
A. That is correct. They smoked differently from one time to another, at different times of the day, different individuals smoked differently, that's correct.
Q. Did the research of the human smoking simulator in any way show that all smokers smoked light cigarettes to get the same amount as they would from a full-flavored cigarette?
A. Did not, no.
Q. Dr. Whidby, you indicated that you worked during your tenure with Philip Morris on nicotine

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analogs?
A. I did.
Q. And would you remind the jury what nicotine analogs are?
A. Nicotine analogs are or were hoped to be compounds similar to nicotine but different in particular ways. Different in the way that would cause those compounds to give what we call the central nervous system effect, the alertness and increased attention, that type of thing; but would be compounds that would not cause the heart rate to go up, blood pressure to go up, that type of thing.
Q. And your role in that project was to do what?
A. To do the analysis of the compounds that the chemists were making to make sure they were making what they thought they made and to assay out the purity of those compounds.
Q. And there were different groups working on different aspects of this compound; right?
A. That is correct, yes.
Q. There was one group, Dr. DeNoble's group was working on one aspect of it; right?
A. Correct.
Q. He was working on what aspect of it?
A. On the central nervous system effect.
Q. And there was another group, Dr. Eagle and Dr. Abood's group, that was working on another aspect?
A. On the peripheral nervous system effects.
Q. And you were working on the actual compounds from information you got from them?
A. Right.

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I wasn't making the compounds. I was working with chemists who were making the compounds to make sure that they were making what they thought they were making.
Q. So the analogs were tested on rats in-house at Philip Morris --
A. Correct.
Q. -- to see whether they had the same central nervous system effects as nicotine?
A. Right.
Q. And that was the work Dr. DeNoble was doing?
A. That is correct.
Q. And outside researchers tested the cardiovascular effects on the analogs?
A. Right.
Q. And that was Dr. Abood and Dr. Eagle?
A. Right.
Q. And were there presentations made about these projects at R & D --
A. Yes.
Q. -- that you participated in?
A. Yes.
Q. Was that project a success?
A. No, it was not.
Q. Why not?

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A. We were never able to find a compound, a chemical, that would have the desired effect, that is, to affect the central nervous system but not the peripheral nervous system.
Q. Now, while the nicotine analog program was going on, was it a sensitive project?
A. Yes.

Q. Was it proprietary?
A. Yes.
Q. And by "proprietary," would you tell us what you mean?
A. I didn't want the competition to know about it. We didn't want the competition to know about it.
Q. Did Philip Morris U.S.A. scientists ultimately publish journal articles about the development of nicotine analogs?
A. We did, yes.
Q. Were those analogs patented?
A. In some cases, yes.
Q. And are patents available to the public?
A. They're always available.
Q. And did P.M. U.S.A. in connection with that analog program actually share some of the nicotine analogs with outside scientists from -- other than from Philip Morris?
A. Yes.
Q. Dr. Whidby, I wanted to ask you to --
Well, let's bring up, Ted -- and we'll try to wrap up here -- DDA-1097.
May we publish, Your Honor?
THE COURT:
There is no objection, I presume. You may publish it.
EXAMINATION BY MR. GAY:
Q. Now, Dr. Whidby, this demonstrative, this says, "What has Philip Morris done?" Number 1 is "General Reduction."
Have we covered the general reduction aspects

of what Philip Morris has done to try to reduce tar and nicotine and other components of cigarette smoke to its consumers?
A. We have.
Q. Now, "Selective Reduction," I'm not sure we covered all of that. Can you explain that a little bit further?
A. Well, selective reduction, as you might remember, is our attempt to remove individual compounds out of the smoke stream as opposed to the general reduction where we're trying to remove -- reduce all the compounds in the smoke stream.
And you may remember that when I was discussing one of the filters, one of the areas of our success, one of the few areas of our success, was with the use of the plasticizer triacetin on the filter that greatly reduces the amount of volatile nitrosamines and the amount of phenols that are in

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the smoke stream.
Q. Selective reduction is difficult?
A. Selective reduction is one of the toughest games in town. Very, very difficult.
Q. Because of the complexity of cigarette smoke?
A. That's correct.
Q. It's got four thousand plus compounds in it?
A. Five thousand plus probably, yes.
Q. Okay. And when you, for example, reduce one type of compound in cigarette smoke, does it often cause a problem with other compounds?
A. It has, yes.
Q. Do you have an example of that?
A. One example I can think of is our attempts to

try to reduce the polycyclic aromatic hydrocarbons. Those compounds are primarily produced during combustion. One of the -- One thing we can add -- could add to tobacco to reduce those would be nitrates.

The problem -- And nitrates do reduce polycyclic aromatic hydrocarbons to some extent. But when you add nitrates to the tobacco, you increase the oxides of nitrogen as well as some of the nitrosamines. So that's not what we want to do, I don't think.

Q. And so then Philip Morris has also attempted to denicotinize tobacco. We covered that story?
A. Yes, we did.
Q. And nonconventional cigarettes as well?
A. We talked about that with the Accord, yes.
Q. Now, Dr. Whidby, in your opinion as a cigarette design expert, has Philip Morris done everything it could to reduce tar and nicotine and other constituents of cigarette smoke?
A. We have. Yes, we have.
Q. And have you done that as soon as you could with regard to what available technology has been made over the years?
A. Just as soon as we had it, yes.
Q. Is there anything that you think you could have done sooner?
A. No.

MR. GAY:
I tender the witness, Your Honor.
MR. RUSS HERMAN:
Mr. Gay, out of courtesy to you, do you

wish to introduce those --

MR. GAY:
Thank you. Thank you very much.
MR. RUSS HERMAN:
You're welcome, sir.
MR. GAY:
Your Honor, in connection with the testimony of the witness, I would like to offer, introduce into evidence SA-4910 and 4909, SA-3786 and SA-4967.
MR. RUSS HERMAN:

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No objection.
THE COURT:
Hearing no objection, they will be received in evidence.
MR. GAY:
I believe there were some additional cigarette packages we used: Commander, Marlboro and Merit Ultima.
MR. RUSS HERMAN:
That's correct.
MR. GAY:
So I'll go ahead and -- The Merit Ultima is SA-4972, Your Honor, the Marlboro is SA-4969 and the Commander is SA-4968.
THE COURT:
No objection?
MR. RUSS HERMAN:
No objection, Your Honor.
THE COURT:
They will be received.
MR. RUSS HERMAN:

Your Honor, I'd like just one moment.
(Whereupon a discussion was held off the record.)
MR. RUSS HERMAN:
Good afternoon, ladies and gentlemen.
THE JURY:
Good afternoon.
MR. RUSS HERMAN:
Good afternoon, Judge Ganucheau, staff, Dr. Whidby, learned counsel. I'll reintroduce myself. I'm Russ Herman, a lawyer from New Orleans.

CONTINUED CROSS-EXAMINATION

BY MR. RUSS HERMAN:
Q. I've got a number of questions to ask you. And although this box is filled with documents you did not bring to court, I'm going to have to ask you about some of them because we need to clarify some of the things you've said. But I don't intend to go through every document and every word, okay? But if you want me to, I'll be happy to do it, okay? I want to try to expedite this, if I can.
Now, thus far, in a day and a half, you have not introduced through your testimony a single, expert, authoritative journal article supporting any opinion which you've given; is that correct?
A. That's correct.
Q. And thus far, in the day and a half of testimony, you have not produced a single document from Philip Morris to support a single answer that you have given to counsel's questions; isn't that correct?

A. I haven't introduced any documents that I know of, no.
Q. Okay. Now, I'd like to start off with the organizational -- what I won't call the

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organizational chart -- a chart that I made, JW-17.
Do you recall it from yesterday?
A. I recall the chart, yes. Not the details, but I do recall the chart.
Q. Yes. I don't know that I remember the details.
MR. RUSS HERMAN:
So may I put that on the Judge's screen and can we publish?
May we publish, Your Honor?
THE COURT:
You may publish it.
EXAMINATION BY MR. RUSS HERMAN:
Q. Now, where it says "Vice-President - Research and Development, Richmond, Virginia," Dr. Wakeham and Dr. Seligman and Dr. Hausermann are actually Vice-Presidents of Philip Morris cigarettes; right?
A. I don't think we had a title as such, I'm sorry.
Q. Well, they're Vice-Presidents; aren't they?
A. Of R & D, yes.
Q. And where it says T. S. Osdene, he was a Director of Biochemical Research? Even though we start off with the President, we get to Vice-Presidents, he's actually a Director of Biochemical Research; isn't that true?
A. He was, yes.
Q. And Dr. Farone, he was a director, also;

wasn't he?
A. Yes, he was.
Q. And then we have here Drs. Charles, Morgan, DeNoble, Levy, Johnston, Uydess. And as I understand your testimony, in 1976 there were some couple of hundred folks in R & D beneath them, right, that aren't even shown here?
A. I think that misstates what the real organizational chart says.
Q. Well, then, let me get to -- I'm sorry. Go ahead.
A. They were below the director level there. And, again, this really is a tough chart for me to work with because it's not really an organizational chart.
So at one time -- What I said was about three hundred people were in R & D. And those were below, when I went there, Dr. Wakeham.
Q. Okay.
A. There were, as I recall -- and I may not recall exactly correctly at this point -- there was, I believe there was two, two directors when I went there. One was Dr. Osdene and the other was -- may have been Dr. Gannon. I'm not real sure who it was.
But I think we had two directors at the time, both reporting to Dr. Hausermann. Below that were some managers, and below them were some project leaders, and below the project leaders were individuals within the projects.
Q. Well, as of 1976, is it fair to say that there were several hundred people at Philip Morris in Richmond in Research & Development below the

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level of Dr. Osdene and Dr. Farone?
A. Yes.
Q. Okay. Now, just so that we're clear, I did manage to find the actual Philip Morris organizational charts.
Let's put up Exhibit 3183.02 on the Judge's screen.
Can you read that, sir?
A. You're asking me?
Q. Yes, sir.
A. Just barely.
Q. All right. Well, Your Honor --
Do you recognize it as saying "Research & Development Department, Vice-President Seligman" at the top? Do you see that? And at the bottom an October 1977 date?
A. Yes, I do. It looks like October the 3rd, 1977.
Q. That is a Philip Morris organizational chart; is it not?
A. It looks like it, yes.
MR. RUSS HERMAN:
I'd like to display this exhibit and introduce it in evidence, Your Honor.
MR. GAY:
No objection, Your Honor.
MR. RUSS HERMAN:
Would you please --
THE COURT:
You may publish it and it will be received.
MR. RUSS HERMAN:

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Carl, just take the top line up to where Mr. Seligman is listed, would you enlarge that, if you can?
EXAMINATION BY MR. RUSS HERMAN:
Q. It shows Mr. Seligman at the top and Mr. Wakeham or Dr. Wakeham over here, Corporate Vice-President; Vice-President of Science and Technology, R. B. Seligman.
And let's go down from there. Let's get the bottom part, if we can, Carl, and just enlarge it.
And here we have Director of Research, T. S. Osdene; Director of Applied Research, Dr. Farone; correct?
A. Correct.
Q. And then we have people below them; correct?
A. That's correct, yes.
Q. All right. The reason I'm -- You want to know why I'm doing this?
A. I don't really -- I could, but it doesn't really bother me.
Q. Because their names are in these documents --
A. Okay.
Q. -- okay?
Let's look at the next organizational chart.

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This is 1979.
Would you put the 1979 chart, that is, Exhibit 3534 on the Judge's screen and for the witness?
Can you see that, sir?
A. Yes.
Q. It appears to be a Philip Morris

organizational chart; does it not?
A. It does, yes.
Q. And at the bottom, it has the date 1979?
A. That is correct, yes.
MR. RUSS HERMAN:
I'd like to publish this document and introduce it, Your Honor.
MR. GAY:
No objection, Your Honor.
THE COURT:
You may publish it and it will be received in evidence.
MR. RUSS HERMAN:
Carl, let's get to the top for 1979.
EXAMINATION BY MR. RUSS HERMAN:
Q. Again, it's got Dr. Wakeham as a Corporate Vice-President and Vice-President of Science and Technology, and Dr. Seligman as a Vice-President; right?
A. Yes, it does.
Q. Over here it says, "CONFIDENTIAL. DO NOT COPY." So let's try to keep it just in this courtroom.
Let's go down to the bottom, Carl. Let's enlarge it, please, Carl. Thank you, sir.
Mr. Osdene again --
A. Yes.
Q. -- Director of Research?
A. Dr. Osdene is correct, yes.
Q. Dr. Farone, Director of Applied Research; correct?
A. Correct.

Q. Okay. Let's go to the next organizational chart. This is 1980, it's Exhibit 3007. I'd like to put it on the witness' and the Judge's screen.
It appears to be a Philip Morris organizational chart; does it not?
A. It does, yes.
Q. At the bottom it's dated in 1980; is that correct?
A. January 1st, '80, that's correct.
MR. RUSS HERMAN:
Your Honor, my intention is to ask you that this be published and that it be introduced into evidence.
MR. GAY:
No objection, Your Honor.
THE COURT:
You may publish and it will be received.
MR. RUSS HERMAN:

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Carl, would you please put it up? Would you highlight the top part? Would you enlarge it?

EXAMINATION BY MR. RUSS HERMAN:

Q. Again, we see Dr. Wakeham and Dr. Seligman; correct?

A. Correct.

Q. And let's go down, Carl, to the bottom part and enlarge it.

Dr. Osdene is right here again and Dr. Farone is right here; correct?

A. That's correct.

Q. All right. Let's go down to the organizational chart for 1983, Exhibit 3182.02.

And publish it, please, just for the Judge and the witness.

Sir, does this appear to be a Philip Morris organizational chart for the year 1983?

A. I don't see the date on there, but I won't argue with you. Oh, there it is. I'm sorry. I see it now, thank you.

Q. Does it appear to be a Philip Morris organizational chart for Research & Development in 1983, sir?

A. Yes.

MR. RUSS HERMAN:

All right. Let's put it up, please, on -- Your Honor, may I publish and introduce this?

MR. GAY:

No objection, Your Honor.

THE COURT:

You may publish it and it will be received in evidence.

MR. RUSS HERMAN:

Would you just publish that whole part up there, please?

EXAMINATION BY MR. RUSS HERMAN:

Q. H. A. Hausermann --

A. Yes.

Q. -- Research & Development Department, Vice-President.

Let's go to the next line, please. Would you blow that up, please?

Dr. Osdene right here, Director of Research and External Studies; correct?

A. It says ex-something, yes.

Q. All right. Let's go to the next line, please. Could you enlarge that, please?

And here's Dr. Lilly; correct?

A. I'm sorry. Show me where Dr. Lilly is.

Q. Physical Research. Right here (indicating).

A. No, sir, I don't see that as Dr. Lilly.

Q. Oh, I'm sorry. I'm actually looking for you. It's right here (indicating), I believe, J. Whidby.

A. That's me.

Q. Okay. And that's 1983; correct?

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A. That's correct.
Q. Thank you very much.
Now, you testified that there was open communication within the Research Department. You all discussed things back and forth, back and forth; correct?
A. And there was, yes.
Q. Well, you never discussed "the gentlemen's agreement"?
A. I never heard of "the gentlemen's agreement" until I was in courtrooms like this, that's correct.
Q. And at that time or before that time, the attorneys that were working with you for Philip Morris never showed you any documents that had the words "gentlemen's agreement" in it?
A. They certainly did not.
Q. And the only time you saw it or the first time is when it was produced in a court of law and you were confronted with it; isn't that correct?
A. In that -- Under that situation, yes.
MR. RUSS HERMAN:

Now, I'd like to, Carl, if you don't mind, just put up the class definition one more time, JW-20.
May we publish, Your Honor?
THE COURT:
You may publish it.
EXAMINATION BY MR. RUSS HERMAN:
Q. I want to show you the part of the definition we didn't cover yesterday.
"One or more of the defendants actively and intentionally engaged in a course of conduct designed to undermine or eliminate compliance with or attention to warnings on cigarette packaging."
Do you see that, sir?
A. I see it, yes.
Q. All right. Are you aware -- you can take that down -- that in this case there's been an allegation that the defendants and The Tobacco Institute, the cigarette companies and The Tobacco Institute engaged in a secret "gentlemen's agreement" not to test their products biologically in the United States of America?
A. Through this case, yes, I'm aware of that.
Q. All right. Are you aware hypothetically, would you disagree with hypothetically if Dr. Colby came into the court, through a videotape under oath, and indicated that that is exactly what a "gentlemen's agreement" among these companies was supposed to do?
MR. WITTMANN:
Objection, Your Honor. May we approach?
THE COURT:

Yes.
MR. RUSS HERMAN:
If you would give me just one moment, Your Honor. We need help.

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(Whereupon a bench conference is held at this time as follows:)

THE COURT:

Mr. Wittmann.

MR. WITTMANN:

Yes, sir.

Your Honor, I think it's improper cross-examination to ask a witness on cross to comment on the testimony of another witness.

Second, I think that Counsel has misstated the import of what Dr. Colby's testimony was. And I think it's improper cross-examination.

MR. RUSS HERMAN:

May I respond?

Here's his testimony. Secondly, Mr. Gay opened the door by asking him if he ever heard of "the gentlemen's agreement." Lastly, I'm asking him a hypothetical question.

MR. WITTMANN:

Well, I don't think he's asking a hypothetical question with respect to what another witness testified to. This is just a way of getting before the jury what the witness said.

MR. RUSS HERMAN:

I didn't ask if the witness testified to that, just does he agree with it.

MR. WITTMANN:

We can be here all day asking the witnesses on cross what another witness said before. And he's simply going back over and rehashing stuff that's already been put before the jury and highlights it prejudicially. And it's just improper cross, Judge.

MR. RUSS HERMAN:

It also continues on to 12270 of the transcript.

MR. WITTMANN:

We've had this issue come up before, Your Honor.

THE COURT:

I'm not going to allow him to comment on the testimony of other witnesses. But if you -- I think it's appropriate to ask him would you disagree with Dr. Colby and not to comment on Colby's testimony.

MR. RUSS HERMAN:

Sure.

THE COURT:

Ask a direct question.

MR. RUSS HERMAN:

Sure.

THE COURT:

But I'm not going to let you ask him to comment on --

MR. RUSS HERMAN:

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I'll ask it that way.
MR. WITTMANN:
If he even heard of Dr. Colby might be an appropriate lead-in question.
THE COURT:
I'm sorry?
MR. WITTMANN:
If he even heard of -- I doubt if he even heard of Dr. Colby for goodness sakes, this witness.
THE COURT:
He can say that. He's a sophisticated witness. The objection is sustained to that extent.
MR. WITTMANN:
Thank you, Your Honor.
(Whereupon the bench conference is concluded at this time.)
THE COURT:
The objection is sustained.
Don't answer that question. Next question, please.

EXAMINATION BY MR. RUSS HERMAN:

Q. Do you know who Dr. Colby of R. J. Reynolds was?

A. No, sir, I don't.

Q. Do you have any reason to disagree -- Then you would have no reason to either agree or disagree with any statements he made concerning "the gentlemen's agreement"; correct?

A. I have no basis for that.

Q. All right, sir. And I am correct -- I

believe I asked you yesterday -- no biological testing was done on Philip Morris cigarettes in the United States from 1925 to 1996 as sold in the marketplace; isn't that correct?

A. I think I said yesterday we didn't do biological testing on any of the commercial cigarettes during that period of time.

Q. Yes.
And your biological testing during that time was done overseas by INBIFO, a company which Philip Morris purchased overseas; isn't that correct?

A. We didn't do any biological testing on our commercial products there, either, that I'm aware of.

Q. Oh, okay. Thank you.
MR. RUSS HERMAN:
Now, let's look at Exhibit 3020, Exhibit 3020. Would you put that on the screen, please? It was admitted on February 4th, 1903 [sic] during the testimony of Dr. Jaffe. And I would like to have it published once it is on the screen.
THE COURT:
Mr. Herman, you misstated the date it was introduced. Would you restate it?

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MR. RUSS HERMAN:
February 4th, 2003.
We've been here a long time, Judge, but it hasn't been a hundred years. Yet.
THE WITNESS:
Sometimes it feels like it.
MR. RUSS HERMAN:

All right. May we publish, Your Honor?
Well, it's not up yet. Oh, there it is.
Thank you.
May we publish, Your Honor?
THE COURT:
You may publish it.
EXAMINATION BY MR. RUSS HERMAN:
Q. I'd like you to look at a document which has been identified as a Philip Morris document entitled "NEED FOR BIOLOGICAL RESEARCH BY PHILIP MORRIS RESEARCH AND DEVELOPMENT."
Now, first of all, do you see it on your screen, sir?
A. Yeah.
You wouldn't happen to have a hard copy I could look at; would you?
Q. I'll give you my copy if it will help, sure.
A. Well, I hope it will.
Q. All right. Me, too.
THE COURT:
Mr. Herman, I may have one up here.
MR. RUSS HERMAN:
Thank you, Your Honor.
THE WITNESS:
My bifocals don't work real great on screens. They work better on paper.
MR. RUSS HERMAN:
Mine, either. Here you go.
EXAMINATION BY MR. RUSS HERMAN:
Q. I'm looking at Page 175913. It's Page 4.
If you would look at Page 1 first. Do you see that, sir, Philip Morris document? It's a 1968

document.
A. I'm not arguing with it being a Philip Morris document. But I don't see where on the face of the document it says that, but --
Q. It's been previously identified, but --
A. I'm not arguing with you.
Q. All right. Good.
That document, when the attorneys you were working with on all these thirty cases and before that asked you to go through Philip Morris documents, you never saw this?
A. I don't recall seeing this during that particular document search, no, I don't.
Q. Turn to Page 4, sir.
MR. RUSS HERMAN:
May we publish Page 4, Your Honor? May we publish it?
THE COURT:

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The document is in evidence; is it not?
MR. RUSS HERMAN:
Yes, it is, Your Honor.
THE COURT:
You may publish it.
MR. RUSS HERMAN:
Carl, blow up the bottom paragraph, please.

EXAMINATION BY MR. RUSS HERMAN:

Q. Do you see where it says, "We have reason to believe that in spite of the gentlemen's agreement from the tobacco industry...."
Do you see that?

A. I do.

Q. You've never seen that before?

A. No, sir, not except in a courtroom like this or similar to this or during a deposition.

Q. Are you aware that Professor Viscusi from Harvard testified -- Well, do you have any reason to doubt Professor Viscusi's statement that the tobacco industry consists of the attorneys, the companies and The Tobacco Institute?

MR. WITTMANN:
Objection, Your Honor. May we approach?
THE COURT:
You may approach.
MR. RUSS HERMAN:
Your Honor, to save time, I'll withdraw the question. I'd like to move on.
MR. WITTMANN:
The question should be stricken from the record.
MR. RUSS HERMAN:
That's all right. Strike it.
THE COURT:
The question is withdrawn, it will be stricken, and the jury will disregard the question.

EXAMINATION BY MR. RUSS HERMAN:

Q. Now, in the many cases you've testified in, R. J. Reynolds has been -- that's the makers of Winston, Salem -- they've also been a defendant in a number of those cases; haven't they?

A. They've been involved in cases, yes.

MR. RUSS HERMAN:
Would you put up on the witness' screen

Exhibit 5028 for the Judge only, admitted during the testimony of Dr. Colby on February 6th, 2003.
I'd like to publish the document, Your Honor. It's in evidence.
THE COURT:
You may publish it.
MR. RUSS HERMAN:
Would you highlight the first paragraph and enlarge it?

EXAMINATION BY MR. RUSS HERMAN:

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Q. Now, during the trials you've testified in and the preparation you've gone through with attorneys, they have never shown you or confirmed to you the R. J. Reynolds document indicating an alleged "gentlemen's agreement"; correct?
A. I may have seen this during these types of situations in trial and that type of thing.
Q. All right.
A. But to me this document, along with the other one, indicated that if we did have a "gentlemen's agreement" that I didn't know about, it wasn't working very well.
Q. It may not have been working well, but that wasn't the question that was asked you, sir.
A. I'm sorry.
Q. Didn't Mr. Gay ask you if you knew anything about a "gentlemen's agreement," and you said "No"?
A. I didn't know anything about it while I was there, that's right.
Q. Now, it wasn't working well; is that your testimony?

A. I'm just reading what this -- what the document states.
Q. Is it your testimony, as a fact witness or an expert, that it wasn't working well?
A. I can't testify to that from a fact witness or an expert witness. All I can do is read --
Q. Do you have any information --
MR. GAY:
Hold on.
Mr. Herman has got to let the witness finish his answer.
MR. RUSS HERMAN:
I sure do. Go ahead, sir.
THE WITNESS:
All I can say is what it says here.
Just drawing an immediate conclusion from that, basically.

EXAMINATION BY MR. RUSS HERMAN:

Q. All right. Do you have any information that shows that the companies did not agree?
A. I don't have any of that information.
Q. Do you have any information that the defendants in this case, R. J. Reynolds, Lorillard, Philip Morris, Brown & Williamson and The Tobacco Institute didn't enter into together a Frank Statement to the American people, any evidence that shows they didn't do that?
A. No.
Q. Do you have any evidence, sir, to contradict that these companies and The Tobacco Institute created a cigarette controversy?
A. I don't have any evidence, no.

Q. Do you have any evidence to show that the CEOs of each of these companies did not swear together before Congress in 1994 that cigarette smoking didn't cause cancer?

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MR. GAY:
Objection. The same objections as before, Your Honor.
MR. LONG:
May we approach, Your Honor?
THE COURT:
You may approach.
(Whereupon a bench conference is held at this time as follows:)
THE COURT:
Mr. Long.
MR. LONG:
I object to this line of questioning, particularly the last one: Is there any evidence that these guys didn't appear and testify? The jury has heard all about this testimony. All Mr. Herman is doing is just testifying himself. Of course, he doesn't have any evidence. It's a nonsensical question. Everybody knows they testified.
MR. RUSS HERMAN:
The witness, instead of answering "Yes" or "No," volunteered it wasn't working very well. And what I'm showing is it was working and he doesn't have any other evidence to controvert it.
MR. LONG:
The witness said the document in front

of him indicated it wasn't working. What he's talking about now is the congressional testimony. Different issues than in "the gentlemen's agreement." Any evidence they didn't testify and say what they said. It's just repeating Mr. Herman testifying. Of course, he doesn't have any evidence. It's nonsensical.
THE COURT:
You're off "the gentlemen's agreement." You're on congressional testimony. That's your last question.
MR. RUSS HERMAN:
This is a continuation of the conspiracy. They all came in together and swore the same thing. And Mr. Gay opened the door. He asked the question originally about "the gentlemen's agreement."
MR. GAY:
This isn't about "the gentlemen's agreement" all of a sudden. It was on "the gentlemen's agreement." The witness commented on the document which says Philip Morris is not living up to some "gentlemen's agreement." And then he shifts over to congressional testimony. It's way --
THE COURT:
The objection is overruled.
Cross-examination is wide open.
MR. RUSS HERMAN:
Thank you.
(Whereupon the bench conference is

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concluded at this time.)

THE COURT:

The objection is overruled.

EXAMINATION BY MR. RUSS HERMAN:

Q. Do you have any evidence to indicate that these tobacco companies and The Tobacco Institute didn't come in to Congress and all swear that cigarette smoking wasn't addictive and that it didn't cause cancer? Do you have any evidence contrary to that?

A. I don't remember the exact statements they made. I don't have any evidence to that, no.

Q. Now, you were in Research & Development at that time in 1994 in a Director position; weren't you?

A. I was either a Technology Fellow or a Director, yes.

Q. And you all had a lot of information, you all were talking all the time, I'm sure -- Can you tell us whether the people in Research & Development at Philip Morris knew that the President of Philip Morris and these other companies were going to testify under oath before Congress?

A. We knew about it, yes.

Q. Did any of you, to your knowledge, ever write a Congress person, a higher-up in the company, the public, the public health, anyone, "I disagree. Cigarette smoking is addictive"?

A. I didn't do that. I don't know if anybody else did or not. But I can tell you what I did do.

Q. Sir, --

A. What I did do was object to the way that Mr.

Campbell was going to make that statement about addiction. I felt he should have said -- and I told him or told people this to get the information to him -- he should have said, at least in my opinion, and I'm not an expert in this area, but I believe some people have a hard time stopping smoking, for other people it's not so difficult. But to blanketly say it's not addictive, I didn't think that was the right thing to do. That's what I said.

Q. Sir, you never communicated that to anybody outside the company; did you?

A. Other than my family, my wife and my kids, I don't know of anybody else. Maybe my neighbors, probably.

Q. Do you know of anybody in Research & Development in your company or any other company that wrote any outside person challenging what these executives said? Do you, sir?

MR. GAY:

Objection. Asked and answered.

THE COURT:

Overruled. Answer the question if you're able to.

A. I don't -- Like I said before, I don't know of anybody who did that.

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EXAMINATION BY MR. RUSS HERMAN:
Q. Now, Mr. Gay asked you, he said, isn't it true that you have been required to report the additives in your cigarettes or the ingredients in your cigarettes to the FTC? Do you recall that?
MR. GAY:
Objection. It misstates the question.

MR. RUSS HERMAN:
Well, if I said it wrong, please correct me.
THE COURT:
Approach the bench, please.
(Whereupon a bench conference is held at this time as follows:)
THE COURT:
It never fails when you attempt to repeat a prior question of opposing counsel, you're going to draw an objection. The way to ask a question is did Mr. Gay ask you about such-and-such and not attempt to quote it because you're going to draw an objection every time you do it.
MR. RUSS HERMAN:
That's a better question.
(Whereupon the bench conference is concluded at this time.)
THE COURT:
The objection is sustained.
Don't answer that question. Next question, please.
EXAMINATION BY MR. RUSS HERMAN:
Q. I'm going to try to ask you a better question.
Did Mr. Gay ask you about additives or ingredients that had to be reported, all the additives and ingredients in the cigarettes?
A. Yes.
Q. Isn't it true that a single law firm reported the ingredients in all of the tobacco companies'

cigarettes rather than the ingredients in Philip Morris cigarettes separately?
A. That is correct.
Q. So there was never a report to the FTC published that someone could go to and say, "These are the ingredients in Philip Morris cigarettes"; isn't that true?
A. To my knowledge, that's not available, right.
Q. You didn't try to leave the impression that it was; did you, sir?
A. I didn't try to leave that kind of impression at all, no.
Q. Now, I noted -- Sir, have you ever seen a document or has it ever been discussed with you that consultants to Philip Morris might lose their consultancy fees regarding the nicotine and tar issue?
A. I never heard that.

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MR. RUSS HERMAN:
Exhibit 3476, would you put it on the witness' screen and for the Judge? It was introduced in evidence on February 26th, 2003.

EXAMINATION BY MR. RUSS HERMAN:

Q. See the document at the top says, "SMOKER PSYCHOLOGY PROGRAM REVIEW?

A. I do, yes.

Q. Have you seen this document before, sir?

A. Again, do you have a hard copy?

Q. Sure.

A. Please.

(Whereupon a discussion was held off the record.)

MR. RUSS HERMAN:
Your Honor, she's having a reaction (indicating Juror Collins).
Your Honor, I'm going to suggest we take a recess, Your Honor, and perhaps we could begin tomorrow morning.

THE COURT:
Let's recess for fifteen minutes.

(Whereupon a discussion was held off the record.)

THE COURT:
Would everybody in the courtroom please be seated? I'm going to make a phone call. Stay where you are.

MR. RUSS HERMAN:
This gentleman is a physician, Your Honor.

THE COURT:
Would you look at the lady, please?

DR. LUTSCHG:
I'm trying to.

(Whereupon a brief recess was taken at this time.)

THE COURT:
I'm not going to recess for the day. But, ladies and gentlemen of the jury, I'm going to discharge you for at least fifteen minutes. So if you'd just go to the jury room and wait there and let's see what develops.
Ms. Collins, please stay in your chair.

MR. CARTER:
If Your Honor pleases, perhaps the attorneys should also clear the courtroom so she can be treated.

THE COURT:
Let the jurors leave in some order and then we'll deal with it.
Kendall, help the lady, please. She may need more assistance than Donna can offer.

(Whereupon the jury is excused at this time.)

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THE COURT:

For the record, the jurors have left the courtroom. The record should reflect that Juror Jeanne Collins experienced some personal difficulties that appear to be health-related.

For your information, she is the lady who was under treatment for some medical condition. And she was informed by her doctor that he wanted to change her medication, and that she should allow two weeks to become accustomed to the medication. And that was one of the other reasons why we didn't have jurors in the two weeks preceding this week.

And I don't know what her condition is, but we were informed by the doctor that she should be stable if she tolerated the medication for the two-week period. And she did. And that's why she's here.

I don't know that we can continue on any

more today until we know what her medical status is going to be. And I don't know what it's going to take to find that out. Let me see what I can find out.

Excuse us just a moment.

(Whereupon a brief recess was taken at this time from 2:40 o'clock p.m. to 3:01 o'clock p.m.)

THE LAW CLERK:

All rise, please. Recess is over. Court will come to order. Please be seated.

THE COURT:

I have spoken to the doctor who is treating Ms. Collins. And he assures me that she is able to continue as a juror in the case. Her medical history is basically she's on a drug called Dilantin, and this doctor is trying to wean her off of that drug. And he says she has excessive panic attacks in layman's terms. And he assures me that she is able to continue.

She's a little embarrassed, but we're going to attempt to get her -- She has a doctor's appointment for June 16th. And he suggested that we work it out that she sees him early next week. And we're going to do that.

So she is anxious to continue and she will be here tomorrow morning at 9:30 ready to go. We are going to recess for today and resume at 9:30 tomorrow morning.

MR. RUSS HERMAN:

Your Honor?

THE COURT:

Mr. Herman.

MR. RUSS HERMAN:

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It doesn't have to be on the record.
I've advised and was asked, I should be able to finish Dr. Whidby sometime tomorrow after the luncheon break. What that probably means, I understand, is that Witness Scott may be called tomorrow?
MR. WITTMANN:
Yes.
MR. RUSS HERMAN:
And I believe that there is a motion in limine pending. And I just call that to The Court's attention now.
THE COURT:
I understand --
MR. WITTMANN:
We discussed that in chambers this morning.
THE COURT:
-- that there is really nothing left in dispute --
MR. RUSS HERMAN:
Oh, I'm sorry.
THE COURT:
-- in that motion in limine if it's the same motion we were talking about this morning?
MR. WITTMANN:
I assume so, yes.

MR. RUSS HERMAN:
Okay.
MR. BRUNO:
What's the relevance?
THE COURT:
Well, we'll confer about that in the morning. The other issue I wanted to raise is the --
MR. RUSS HERMAN:
Excuse me, Your Honor.
The relevancy issue of that testimony has been resolved?
THE COURT:
Nobody talked about relevancy. There was some issue about personal issues and personal history. And that was discussed in chambers this morning. And it's my understanding that those issues were resolved. If there are some issues about relevancy, we can deal with that in the morning.
MR. RUSS HERMAN:
Okay, sir.
THE COURT:
And the other thing I want to --
MR. BOYCE:
Can we excuse Dr. Whidby?
THE WITNESS:
Thank you, sir.
THE COURT:
I understand that Special Master Gianna has scheduled a hearing on Monday on

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"Plaintiffs' Motion to Compel Production of Documents Directed to All Defendants and Request for Evidentiary Hearing" --

MR. RUSS HERMAN:

Yes, sir.

THE COURT:

-- at his office on Monday.

MR. RUSS HERMAN:

Yes.

THE COURT:

I received a response. I'm sure plaintiffs' counsel hasn't had a chance to look at it, but it was delivered to me this afternoon. I want to discuss that sometime during the day tomorrow, so be prepared. Maybe at the luncheon recess or some other time during the day when it appears that we have the time. Particularly in light of the provisions of CMO-2.

Anything for the record before we recess for today? Plaintiffs' counsel?

MR. RUSS HERMAN:

No, Your Honor.

I will indicate we received that response sometime before noon today.

THE COURT:

Yes.

All right. Defense counsel, anything for the record?

MR. WITTMANN:

No, Your Honor.

THE COURT:

Okay. We will recess until 9:30 tomorrow morning.

(Whereupon the proceedings were adjourned at 3:06 o'clock p.m.)

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REPORTER'S CERTIFICATE

I, CHERYL FOURNET HUFFMAN, Registered Merit Reporter, in and for the State of Louisiana, as the officer before whom this testimony was taken, do hereby certify that this testimony was reported by me in the stenotype reporting method, was prepared and transcribed by me or under my personal direction and supervision, and is a true and correct transcript to the best of my ability and understanding; that I am not related to counsel or to the parties herein, nor am I otherwise interested in the outcome of this matter.

_____

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